Mohamad Khalid bin Yusuf v The Datuk Bandar Kuching Utara

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12–08 OF 2005–II
HAMID SULTAN JC
29 JUNE 2007

Civil Procedure — Pleadings — Function of pleadings — Whether failure to plead defeat the claim of plaintiff or defendant if the parties were not prejudiced in any manner whatsoever — What was the law of pleadings in dealing with statutory breach — Whether there was a distinction between a positive claim for breach of statutory duty which was often pleaded and a negative duty ie in performing the statutory duty public authorities must not injure

Tort — Damages — Negligence — Second defendant severed underground electrical supply cable leading to plaintiff's dwelling — Whether court could award general damages when plaintiff under head of special damages was not able to substantiate claim — What must be established by plaintiff to determine quantum

The first respondent had engaged the second respondent in the construction of drains in the vicinity of the appellant's dwelling house. The second respondent excavated and severed the underground electrical supply cable leading to the appellant's dwelling house, thereby causing damage to the whole internal electrical wiring system of the said dwelling. The learned judge had dismissed the appellant's claim for negligence against the first respondent. The grounds of appeal, inter alia, was that the sessions court judge erred in law and/or on the facts in holding that: (i) the plaintiff had not proved on a balance of probabilities that the first defendant was vicariously liable for the wrongful act of the second defendant as its servant or agent; (ii) the plaintiff could not rely on the exception to the general rule by alleging that there was a breach of statutory duty by the first defendant because it was never pleaded; (iii) the plaintiff had failed to prove on a balance of probabilities that the first defendant was liable for the wrongful act of the second defendant; (iv) failing to assess the right quantum of damages, etc.

Held:

(1) A claim by the plaintiff solely could not be defeated by rules of pleading in this age and time where much literature had been advanced to condone non-compliance of rules and rules of procedure had been amended to ensure courts hear the merits of the case. In this case, the defendants were fully aware of the nature of the plaintiff's claim and the issue of liability and what they had to deal with to defend the action. They had not alleged that they had been prejudiced by the manner the plaintiff had pleaded his case (see para 24(a) & (b)).

(2) There was a distinction between a positive claim for breach of statutory duty which was often pleaded and a negative duty ie in performing the statutory duty public authorities must not injure. The positive claim was necessary for the defendant to identify the cause of action and the relevant statute which imposed the obligation. However, if in performing the statutory duty, the defendant or his employees or agent had acted in a negligent manner, then the ordinary rules as to pleading in respect of negligence would apply (see para 24(d)).

(3) On the issue of quantum, the court took the view that the plaintiff's claim for special damages must be strictly proved. The learned sessions judge had dealt with this issue in detail and set out her reasons. The court ought not to disturb her finding on quantum where the law placed the burden on the plaintiff to specifically plead and proof. In consequence, the award of RM4,150 as special damages was sustained (see para 25(c)).

[Bahasa Malaysia summary

Responden pertama/defendan pertama telah menggunakan khidmat responden kedua/defendan kedua dalam pembinaan longkang di sekitar kawasan rumah kediaman perayu/plaintif. Responden kedua telah menggali dan memutuskan kabel elektrik bawah tanah yang disambung ke rumah kediaman perayu, dengan itu menyebabkan kerosakan kepada keseluruhan sistem penyambungan elektrik dalaman di kediaman tersebut. Hakim yang bijaksana telah menolak tuntutan perayu untuk kecuaian terhadap responden pertama. Alasan-alasan rayuan, inter alia, adalah bahawa hakim mahkamah sesyen telah tersilap dari segi undang-undang dan/atau fakta-fakta dalam memutuskan bahawa: (i) plaintif tidak dapat membuktikan atas imbangan kebarangkalian bahawa defendan pertama adalah bertanggungjawab secara vikarius untuk perbuatan salah defendan kedua yang salah sebagai pekerja atau ejen; (ii) plaintif tidak dapat bergantung pada pengecualian kepada peraturan am dengan mendakwa bahawa terdapat satu keingkaran kewajipan berkanun oleh defendan pertama kerana ia tidak diplidkan; (iii) plaintif telah gagal membuktikan atas imbangan kebarangkalian bahawa defendan pertama adalah bertanggungjawab untuk perbuatan salah defendan kedua; (iv) gagal menilai kuantum kerugian yang betul, dan lain-lain.

Diputuskan:

(1) Satu tuntutan oleh plaintif dengan sendirinya tidak dapat digagalkan oleh peraturan-peraturan pliding dalam masa kini di mana terdapat banyak penulisan yang telah dikemukakan di mana ketidakpatuhan dengan peraturan-peraturan adalah dibenarkan dan kaedah prosedur telahpun dipinda untuk memastikan mahkamah-mahkamah mendengar merit-merit kes. Dalam kes ini, defendan-defendan sedar sepenuhnya sifat tuntutan plaintif dan isu liabiliti dan apa yang perlu mereka lakukan untuk membela tindakan tersebut. Mereka telah tidak mengatakan bahawa mereka telah diprejudiskan dengan cara plaintif memplidkan kes mereka (lihat perenggan 24(a) & (b)).

(2) Terdapat perbezaan di antara tuntutan positif untuk keingkaran kewajipan berkanun yang kerapkali diplidkan dan kewajipan negatif iaitu, dalam menjalankan kewajipan berkanun pihak berkuasa tidak boleh menyebabkan kerosakan. Tuntutan positif adalah perlu untuk defendan mengenalpasti kausa tindakan dan statut yang relevan yang mengenakan obligasi tersebut. Akan tetapi, sekiranya dalam menjalankan kewajipan statutori, defendan atau pekerja-pekerja atau agennya telah bertindak dalam keadaan yang cuai, maka peraturan-peraturan am pliding yang berhubung dengan kecuaian akan terpakai (lihat perenggan 24(d)).

(3) Atas isu kuantum, mahkamah berpendapat bahawa tuntutan plaintif untuk ganti rugi khas harus dibuktikan dengan kukuh. Hakim mahkamah sesyen yang bijaksana telah memutuskan isu ini secara terperinci dan mengemukakan alasan-alasannya. Mahkamah tidak seharusnya mengganggu penemuannya atas kuantum di mana undang-undang telah meletakkan beban ke atas plaintif untuk memplidkannya secara khusus dan membuktikannya. Dengan itu, awad RM4,150 sebagai ganti rugi khas dikekalkan (lihat perenggan 25(c)).]

Notes

For cases on function of pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5421–5423.

For cases on damages for negligence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 208–226.

Cases referred to

Anthony Goh Khiok Loong (suing by his father and next friend, Goh Kok Hua) v Chan Yam Heng & Anor [2007] 1 MLJ 140
Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615
Bonham Carter v Hyde Part Hotel Ltd [1948] 64 TLR 177
Bower v Peate [1876] 1 QBD 321
Capital Insurance Bhd v Kasim bin Mohd Ali [2000] 1 MLJ 193
Chu Kim Seng & Anor v Abdul Razak bin Amin [1999] 6 MLJ 433
Chua Liong Hai v Lian Soon Industries Sdn Bhd [2004] 8 CLJ 117
D & F Estates Ltd v Church Commissions for England [1988] 2 All ER 922
Datuk Bandar Kuala Lumpur v Seman bin Amat [1996] 3 CLJ 263
Development & Commercial Bank Bhd v Abdullah bin Ismail & Anor [1989] 1 CLJ 190
Ellis v Sheffield Gas Consumers' Co [1853] 2 E & B 767
Hewitt v Bonvin [1970] 1 All ER 749
Hu Sepang v Keong On Eng & Ors [1991] 1 MLJ 440
Kandaraju a/l Frapatan v MBF Finance Bhd [2006] 7 MLJ 91
Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119
KEP Mohamed Ali v KEP Mohamed Ismail [1981] 2 MLJ 10
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223
Koperasi Belia Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd [1998] 3 MLJ 209
Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal [2006] 1 MLJ 675
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428
Lee Sau Kong v Leow Cheng Chieng [1961] MLJ 17

A *Lim Cheng Hai & Anor v ZKP Development Sdn Bhd* [2002] MLJU 232
London Passenger Transport Board v Upson & Anor [1949] AC 155
Maharin Nisha Hassan Mohamed v Panir Selvam Chellamuthu [2005] 7 CLJ 289
Mahtavan a/l Shunmugam v Woo Bee Leng [1995] 1 MLJ 841
McLaughlin v Pryor [1842] 4 MAC L G 48
B *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385
Metroplex Development Sdn Bhd v Mohd Mastana Bin Makaddas & Anor [1995] 2 MLJ 276
Mohamad Nazri bin Ali v Abdullah Sidek [2000] 6 MLJ 355
Ng Hee Thong v Public Bank Berhad [1995] 1 CLJ 609
C *Norton v Canadian Pacific Steamships Ltd* [1961] 2 All ER 785
OCBC Bank (Malaysia) Bhd v Unimasco Sdn Bhd [2004] 6 CLJ 484
On Ah Long v Dr S Underwood [1983] 2 MLJ 324
Parimala a/p Muthusamy & Ors v Projek Lebuhraya Utara-Selatan [1997] 5 MLJ 488
Pinn v Rew [1916] 32 TLR
D *Richard Tsen Wei Tseng v HSBC Bank Malaysia Berhad* [2006] 2 CLJ 378
Rookes v Barnard [1964] AC 1129
Rosita bte Baharom (an infant) v Sabedin bin Salleh [1993] 1 MLJ 393
Sashidaran a/l KV Nair & Anor v Alliance Bank Malaysia Bhd (formerly known as Multipurpose Bank Bhd) [2006] 5 MLJ 532
Sii Toh Siong v Hung Ming Chung [2000] 2 MLJ 204
E *Sri Minal Construction Sdn Bhd v Mobil Oil Malaysia Sdn Bhd* [2006] 1 MLJ 746
Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185 (refd)
Tan Kuan Yau v Suhindrimani [1985] 1 CLJ 429 (refd)
The Chartered Bank v Yong Chan [1974] 1 MLJ 157 (refd)
F *Tractors Malaysia Sdn Bhd v Chiew Chong Huat* [1999] 2 CLJ 51 (refd)
Vandyke v Fender [1970] 2 All ER 339 (refd)
Wong See Leng v C Saraswathy Ammal [1954] MLJ 141 (refd)
Wong Sie Sing Contractor Sdn Bhd v Gregory Anak Anyau [1998] 2 CLJ 707 (refd)
Yap Nyo Nyok v Bath Pharmacy Sdn Bhd [1993] 2 MLJ 250 (refd)
Yew Wan Leong v Lai Kok Chye [1990] 1 CLJ 1113 (refd)
G

Appeal from: Summons No 52–1209 of 1998 (I) (Sessions Court, Kuching

Ratanah Devi (Idris & Co) for the plaintiff.
H *William Ding (William Ding & Co) for the first respondent.*

Hamid Sultan JC:

I **[1]** This is my judgment in respect of the appellant/plaintiff's appeal against the decision of the learned sessions judge dated 14 October 2004 given after full trial.

[2] The first respondent had engaged the second respondent in the construction of drains in the vicinity of the appellant's dwelling house, situated along Jalan Istana, Kuching. On 17 March 1993 the said second respondent excavated and severed the

underground electrical supply cable leading to the appellant's dwelling house, thereby causing damage to the whole internal electrical wiring system of the said dwelling. The learned judge had dismissed the appellant's claim for negligence against the first respondent. The appellant's claim against the respondents is for (i) special damages towards the sum of RM65,564.50 (ii) general damages with interests and costs.

[3] The statement of agreed facts read as follows:

> (a) the plaintiff is the registered proprietor and occupant of the dwelling house commonly known as No. 198, Jalan Istana, Petra Jaya, Kuching. (b) the first defendant is a sole corporation pursuant to section 5 of the City of Kuching North Ordinance 1988. (c) the first defendant did engage the second defendant, a construction firm as contractor to construct and complete drainage improvements along Jalan Istana, Petra Jaya, Kuching.

[4] The learned sessions judge's conclusion as to liability reads as follows:

> My conclusion on the issue of liability is that although the plaintiff had proved on the balance of probability the negligence of the second defendant by successfully invoking the doctrine of *res ipsa loquitur*, he has not proved on the required balance that the first defendant was vicariously liable for the wrongful act of the second defendant as its servant or agent. Although it is the admitted fact that the first defendant was the employer of the second defendant who was the independent contractor, the plaintiff could not rely on the exception to the general rule by alleging there was a breach of statutory duty by the first defendant because it was never pleaded. For the reasons as stated, my conclusion on the issue of liability is that the Plaintiff has failed to prove on the balance of probability that the first defendant is liable for the wrongful act of the second defendant.

[5] The grounds of appeal, inter alia, read as follows: The sessions court judge erred in law and/or on the facts in holding that (i) the plaintiff has not proved on a balance of probabilities that the first defendant was vicariously liable for the wrongful act of the second defendant as its servant or agent. (ii) the plaintiff could not rely on the exception to the general rule by alleging that there was a breach of statutory duty by the first defendant because it was never pleaded. (iii) the plaintiff had failed to prove on a balance of probabilities that the first defendant is liable for the wrongful act of the second defendant. (iv) failing to assess the right quantum of damages, etc.

[6] The appellant and the respondent cited the following authorities, namely: (i)*Chu Kim Seng & Anor v Abdul Razak bin Amin* [1999]6 MLJ 433; (ii)*Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994]3 MLJ 185; (iii) *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10; (iv)*Parimala a/p Muthusamy & Ors v Projek Lebuhraya Utara-Selatan* [1997]5 MLJ 488; (v)*Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119; (vi) *Laksmana Realty Sdn Bhd v Goh Eng Hwa* [2006] 1 MLJ 675; (viii)*Wong Sie Sing Contractor Sdn Bhd v Gregory Anak Anyau* [1998] 2 CLJ 707; (ix) *Mohamad Nazri Ali v Abdullah Sidek* [2000] 6 MLJ 355; (x) *Chua Liong Hai v Lian Soon Industries Sdn Bhd* [2004] 8 CLJ 117; (xi) *Datuk Bandar Kuala Lumpur v Seman bin Amat* [1996] 3 CLJ 263; (xii) *Sii Toh Siong v Hung Ming Chung* [2000] 2 MLJ 204; (xiii) *Kandaraju Frapatan v MBF Finance Bhd* [2006] 7 MLJ 91 (xiv) *Anthony Goh Khiok Loong (suing by his father and next friend, Goh Kok Hua) v Chan Yam Heng* [2007] 1

MLJ 140; (xv) *Richard Tsen Wei Tseng v HSBC Bank Malaysia Berhad* [2006] 2 CLJ 378; (xvi) *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223; (xvii) *Koperasi Belia Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 MLJ 209; (xviii) *Ng Hee Thong v Public Bank Berhad* [1995] 1 CLJ 609; (xix) *Maharin Nisha Hassan Mohamed v Panir Selvam Chellamuthu* [2005] 7 CLJ 289; (xx) *Tractors Malaysia Sdn Bhd v Chiew Chong Huat* [1999] 2 CLJ 51; (xxi) *OCBC Bank (Malaysia) Bhd v Unimasco Sdn Bhd* [2004] 6 CLJ 484; (xxii) *Sashidaran KV Nair v Alliance Bank Malaysia Bhd* [2006] 5 MLJ 532; (xxvi) *Sri Minal Construction Sdn Bhd v Mobil Oil Malaysia Sdn Bhd* [2006] 1 MLJ 746; (xxvii) *Lim Cheng Hai & Anor v ZKP Development Sdn Bhd* [2002] MLJU 232; (xxviii) *Megat Najmuddin bin Dato Seri Megat Khas v Bank Bumiputra Malaysia Bhd* [2002] 1 MLJ 385; (xxviii) *Capital Insurance Bhd v Kassim bin Mohd Ali* [2000] 1 MLJ 193.

[7] This appeal came for hearing on 24 April 2007. Parties agreed that the appeal can be dealt with by written submissions. I fixed decision on 29 May 2007. However, I was not able to deliver the decision on that date because both parties' submissions were incomplete and did not directly answer the issues related to this appeal, which is found in the conclusion of learned sessions judge at p 28 of the appeal record. Further, both parties have not submitted what should be the quantum that ought to be awarded, if the appeal is allowed.

[8] After the issues to be addressed had been brought to their attention, both parties agreed that the real issue of liability is one which relates to p 28 of the appeal record. For purpose of determining the issues raised here and to make relevant order as to costs, I posed the following questions, namely:

What are the necessary ingredients which the plaintiff must establish:

(i) If the claim is under negligence and/or; for breach of statutory what is the law of pleadings in dealing with statutory breach?

(ii) Under the new amendments to the rules of court can failure to plead according to the current practice defeat the claim of the plaintiff or defendant if the parties were not prejudiced in any manner whatsoever except by obtaining an advantage by otiose cases on pleadings?

(iii) Is there a distinction between a positive claim for breach of statutory duty which is often pleaded and a negative duty ie, in performing the statutory duty public authorities must not injure. And if it is a negative duty can the claim be grounded on negligence and not for breach of statutory duty?

(iv) What is the difference between a claim for special damages, damages and general damages?

(v) When the plaintiff under the head of special damages is not able to substantiate the claim under special damages can the court award general damages. If so what must the plaintiff establish to determine the quantum and what should be the quantum and why?

(vi) Can award be granted for pain, suffering, inconvenience, distress etc. on the facts of the case; if so what must the plaintiff establish to determine the quantum and what should be the quantum and why?

(vii) When submissions and pleadings are not properly placed before the court, has the court jurisdiction and powers inclusive of inherent jurisdiction to award costs partly only to the litigant and direct the balance to be paid to the legal aid fund, or can the court with consent of the parties in such situation direct part payment of costs to legal aid fund or its like?

[9] The parties have, after the said directions, further filed written submissions. I found that the respondent had not answered all the issues which I had directed.

[10] The first respondent, inter alia, submits as follows: on the issue whether failure to plead statutory breach is fatal, the respondent relies on a number of cases; to name a few are as follows:

(a) In *Wong See Leng v C Saraswathy Ammal* [1954] MLJ 141 and 142 Buhaginr J laid out the object of pleadings viz:

(i) to define the issues of fact and questions of law to be decided between the parties;

(ii) to give each of them distinct notice of the case intended to be set up by the other and thus to prevent either party from being taken by surprise at the trial;

(iii) to provide a brief summary of the case of each party, from which the nature of the claim and the defence may be easily apprehended so as to prevent future litigation upon matters already adjudicated upon between the litigants.

(b) In *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615, the court said:

... pleadings operate to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can present and prepare their respective cases and upon which the court will be called upon to adjudicate between them.

(c) In the case of*Development & Commercial Bank Bhd v Abdullah Bin Ismail & Anor* [1989] 1 CLJ 190 (HC), the court stated:

It is a cardinal principle of pleadings that the parties to an action are bound by their own pleadings.

(d) The court opined in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428 (SC):

Where a vital issue is not raised in the pleadings it would not be allowed to be argued and to succeed on appeal. Lapses in the strict compliance with the rules of pleadings should not be tolerated at the expense of the clients

(e) In the instance of *Mahtavan a/l Shunmugam v Woo Bee Leng* [1995] 1 MLJ 841 (HC), the court held:

It is a trite law that each party is bound by his own pleadings and cannot be allowed to raise an issue without amendment. The court as well are bound by the pleadings in much the same way as the parties themselves.

(f) In *Metroplex Development Sdn Bhd v Mohd Mastana Bin Makaddas & Anor* [1995] 2 MLJ 276 (HC), the court on consideration of the facts before it said:

> The primary function of a statement of claim is to plead reasonable cause of action against the defendant. It must also disclose the legal liability of the defendant. It is therefore essential to link the material facts pleaded in a statement of claim and the substantive right which the plaintiff claims or seeks to enforce against the defendant.
>
> Where breach of duty is alleged, the facts upon which the alleged duty is founded must be pleaded, (emphasis added) and where there is an allegation of negligence, facts must be set out showing the existence of a duty to take reasonable care owed to the particular person or class of person and that the duty was disregarded.

(g) In *Rosita bte Baharom (an infant) v Sabedin Bin Salleh* [1993] 1 MLJ 393, the court on the facts opined:

> The system of pleadings has been designed to ensure fair play between the parties and that each party knows what issues he has to meet in the pleading in advance.
>
> In appropriate circumstances evidence at a trial can overcome defects in the pleadings of the plaintiff as long as the defendant from the very outset has not been misled, prejudiced, embarrassed or in any way taken by surprise or led astray by the plaintiff's pleadings.

(h) *In Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250, the court held:

> A party should not be allowed to raise in his submission or permitted to adduce evidence or any point or matter which has not been pleaded.

(i) In the case of *Yew Wan Leong v Lai Kok Chye* [1990] 1 CLJ 1113 (SC), the court opined:

> The court should only decide on issues reflected in the pleadings otherwise its decision shall be set aside on appeal.

(j) In the case of *Saw Seng Kee v Nadzri & Ng Securities Sdn Bhd* [1996] 2 MLJ 238 (CA), the court said:

> Where a matter is not pleaded or put forward in the Sessions Court, the matter may not be raised in the High Court.

(k) In *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157 the court stated:

> Where the judge has decided on an issue not raised in the pleadings the judgment can be set aside and a new trial ordered.

[11] Further, the respondent says in *Hu Sepang v Keong On Eng & Ors* [1991] 1 MLJ 440, the court opined:

> Firstly, to establish civil liability for a breach of statutory duty, the Plaintiff must show that (a) the injury he has suffered is within the ambit of the statute, (b) the statutory duty imposes a liability to civil action, (c) the statutory duty is not fulfilled, and (d) the breach of the statutory duty has caused his injury.

Secondly, if a statute imposes a duty towards persons generally, no question can arise whether the plaintiff is within the class protected.

Thirdly, where a statute confers a power coupled with a duty to exercise it, failure to do so is a breach of that duty for which a remedy will lie. By contrast, where a statute confers a power coupled with a discretion to exercise it, failure to exercise the power will not attract any liability. The plaintiff is however, still entitled to compensation if the refusal to exercise the discretionary power is malicious.

Fourthly, if a statute creates a duty but does not provide for any remedy, be it civil or criminal, upon its breach, the injured party will have a right to a civil action for otherwise the statute will be meaningless.

[12] On the second issue as to whether the first respondent can be made liable in performing the statutory duty when the claim is grounded on negligence and not of statutory duty, the respondent relies on various cases and some of them are as follows.

(a) Michael A Jones *Textbook on Torts* at pp 268 to 273 states:

> The basic rule is that an employer is not liable for the torts of his independent contractors but there are a number of exceptions to this general rule. None of these exceptions, however, are forms of vicarious liability, for in all of them it is the breach of duty owned to the Plaintiff by the employer that gives rise to liability.

(b) In *Ellis v Sheffield Gas Consumers' Co* [1853 2 E & B 767, the court said:

> … the contractor who had been employed to do something unlawful, such as digging up the street without statutory authority, the employer will be liable for damage resulting from the contractor's negligence. The employer is taken to have authorised or ratified the tort.

(c) In *Pinn v Rew* [1916] 32 TLR; and *McLaughlin v Pryor* [1842] 4 MAC L G 48, the court reflected the following situation:

> The employer is liable on the basis of his personal fault if he has himself been negligent in selecting an incompetent contractor, or the manner in which the work was performed in such a way that damage is caused.

(d) In *D & F Estates Ltd v Church Commissions for England* [1988] 2 ALL ER 922, 1008 the court said:

> If the employer discovers that the contractor's work is being done in a defective and foreseeably dangerous way, he may be liable if he condones the contractor's negligence.

(e) In the textbook of *Charlesworth & Percy on Negligence* at p 181, the learned author says:

> If an employer, who has to perform a duty, imposed on him either by statute or at common law, make a contract with an independent contractor for the performance of that duty, instead of doing it himself, he is liable for the negligence of the independent contractor in carrying it out.

[13] On the issue of damages, the respondent says that the appellant is claiming special damages in the sum of RM65,564.50. Special damages mean the pre-trial loss

which is fixed and ascertainable. It is damages which are reasonable to expect the plaintiff to specify because he knows what they are. In *On Ah Long v Dr S Underwood* [1983] 2 MLJ 324 at pp 327 and 328, the court said:

> It is well established principle that special damages in contrast to general damages have to be specifically pleaded and strictly proved (emphasis added). They are recoverable only where they can be included in the proper measure of damages and are not too remote.

(a) In *Macgregor on Damages* 14th Ed p 1012 para 1498 it is stated as follows:

> In special damages claims the exact loss must be pleaded where the precise amount of item of damages had become clear before the trial either because it has already occurred and so become crystallised or because it can be measured with complete accuracy.

(b) It is a settled law that it is not enough for the plaintiff to itemise those claims, it must be proved. In *Lee Sau Kong v Leow Cheng Chieng* [1961] 27 MLJ 17, the Court of Appeal concurred with the judgment of Lord Goddard in *Bonham Carter v Hyde Part Hotel Ltd* [1948] 64 TLR 177 which reads as follows:

> Plaintiff must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars and, so to speak, throw them at the head of the court saying: This is what I have lost, I ask you to give me these damages. They have to prove it.

[14] Further, the respondent says that the appellant only pleaded in general terms to claim for general damages. There is no indication in the pleading that the appellant is claiming for a personal injury or a claim based on nuisance. However, the learned sessions court judge had awarded the sum of RM1,000 as a reasonable damage for the nuisance caused.

[15] The appellant, inter alia, submits as follows:

> (a) it is trite that for claim under negligence the plaintiff/appellant has the burden to proof the following: (a) duty of care existed, i.e. in this case it is the duty of the first defendant/respondent to take reasonable care to ensure that their contractors (second defendant/respondent) did not damage the electrical cable leading to the plaintiff's house while carrying out construction works. (b) the defendant/respondent had failed to exercise due care and diligence and negligently breached the duty of care; i.e. in this case the first defendant/respondent was negligent in failing to assert supervisory power over the construction works in front of the plaintiff/appellant house. Failure on part of the first defendant/respondent to carry out inspection and proper supervision shows that the first defendant/respondent had breached the duty of care and failed to supervise to ensure that their contractors exercise proper care while executing the construction works. (c) as a result of the breach/negligence the plaintiff/appellant suffered damages ie, in this case the first defendant/respondent's failure to supervise and also due to the failure of the second defendant/respondent's failure to exercise proper care while executing the constructions works, the plaintiff/appellant herein suffered damages. The first defendant/respondent failed to ascertain the whereabouts of the underground cable and also take necessary steps to prevent the damage.

[16] The appellant relies on a number of cases to strengthen his arguments. To mention a few are as follows: A

(a) In the Federal Court case of*Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 by referring to the case of *Hewitt v Bonvin* [1970] 1 All ER 749 it was stated as follows: B

> If A suffers damage by the wrongful act of B and seeks to say that C is liable for that damage he must establish that in doing the act B as the agent or servant of C. If he says that he was C's agent he must further show that C authorized the act. If he can establish that B was the servant of C the question of authority need not arise.

(b) In the case of *Norton v Canadian Pacific Steamships Ltd* [1961] 2 All ER 785 the court opined: C

> The owner of a car when he takes or sends it on journey for his own purposes, owes a duty of care to other road users, and if any of them suffers damage from negligent driving of the car, whereby by the owner himself or by an agent to whom he has delegated the driving, the owner is liable. D

(c) In the case of *Vandyke v Fender* [1970] 2 All ER 339 the court on the facts stated as follows:

> Ever since the decision of this Court in *Omrod v Crossville Motor Services Ltd* it has been considered clear that where the owner of the car has authorized a driver to drive a car, and has an interest in one of the objects of the particular journey, the driver is his agent when driving. E

[17] In reliance of the above principles, the appellant says that the second respondent in this case is the agent or servant of the first respondent. The construction work belongs to the first respondent as the local authority. That being the case, the first respondent has an interest in that construction work. The first respondent had delegated their project to the second respondent to execute the construction work. In consequence, the first respondent must be vicariously liable for the negligence of their agent/servant ie the second respondent. F G

[18] In respect of the law of pleading in relation to statutory breach, appellant says (i) it is a general rule that object of pleadings would be to alert the other party of the case which he has to meet and to prevent surprise. In the present case, breach of statutory duty is not pleaded. However, the defendants in this case could not be said to have been taken by surprise as they could have anticipated the issue of breach of statutory duty, based on the particulars stated out in the statement of claim of the plaintiff. (ii) Failure to plead statutory breach is not fatal as the particulars of the statement of claim revolve around facts leading to the breach of statutory duty and also damages suffered by the plaintiff subsequently. H

[19] On the issue whether there is a distinction between a positive claim for breach of statutory duty which is often pleaded and a negative duty ie, in performing duty, public authorities must not injure and the claim is grounded on negligence and not breach of statutory duty, the appellant says that breach of statutory duty occurs due to negligence and as such they are not distinct claim but connected with each other. I

[20] On the question of what is the difference between a claim for special damages and general damages is, the appellant says special damages are damages which are not presumed by the law and must be specifically pleaded with full details and particulars. General damages, on the other hand, are damages presumed by the law to follow from the wrong complained and the court has the absolute discretion in granting general damages and relies on the following cases:

(a) In the case of *Laksmana Realty Sdn Bhd v Goh Eng Hwa* [2006] 1 MLJ 675, it was held as follows:

> General damages are awarded for harm that is not quantifiable. Special damages are awarded where the damage suffered is readily quantifiable in monetary terms

(b) *In Laksmana Realty Sdn Bhd*, the court (by referring to the case of *Tan Kuan Yau v Suhindrimani* [1985] 1 CLJ 429), stated:

> The principle that could guide this court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case, in particular the amount of the award. In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that either there was an omission on the part of the Judge to consider some relevant materials or he had admitted for purposes of assessment some irrelevant considerations. If the court is satisfied or convinced that the Judge has acted upon wrong principles of law then it is justified in reversing; indeed it is its duty to reverse the finding of the trial Judge.

(c) In the same case of *Laksmana Realty Sdn Bhd*, the following principles were stated on awarding exemplary damages (by referring to the case of *Rookes v Barnard* [1964] AC 1129):

> …. I wish now to express three considerations which I think should always be borne in mind when awards of exemplary damages are being considered. First the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence. Secondly the power to award exemplary damages constitutes a weapon that while it can be used in defence of liberty, as in the Wilkecase (1763) Lofft 1, can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal and moreover a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint.

[21] With regard to the issue whether award can be granted for pain and suffering inconvenience, distress etc, on the facts of the case, and if so what must the plaintiff establish to determine the quantum and what should the quantum be and why, the appellant says general damages ought to be awarded to the appellant for suffering, inconveniences and distress for living in fear of the consequences of using unsafe switches in their house for a period of four to five months.

[22] On considering the instance when submissions and pleadings are not properly placed before the court, has the court jurisdiction and powers inclusive of inherent jurisdiction to award costs partly only to the litigant and direct the balance to be paid to the legal aid fund or can the court with consent of the parties in such situation direct part payment of costs to legal aid fund or like, the appellant says it will tantamount to punishing the appellant by way of costs. The appellant argues that no order ought to be made to direct any part of the costs to be paid to the legal aid fund.

[23] In conclusion, the appellant says it is the duty of the appellate court to interfere with award on damages in the event wrong principles of laws and erroneous estimation of damages had been adopted by the trial court. In the Court of Appeal case of *Wong Sie Sing Contractor Sdn Bhd v Gregory Anak Anyau* [1998] 2 CLJ 707, it was held that:

> ... the court before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law or has misapprehended the facts or has for these or other reasons made a wholly erroneous estimate of the damage suffered.

[24] The respondents oppose this appeal primarily on one ground that is to say that it was never pleaded in the statement of claim that the first respondent breached any statutory duty under any specific or relevant provision of the law. This was also the main ground for the learned sessions judge to dismiss the case, for the learned sessions judge in her conclusion, firstly says that the appellant had proved on the balance of probability the negligence of the second respondent by successfully invoking the doctrine of *res ipsa loquitur*, but has not proved on the required balance that the first defendant was vicariously liable for the wrongful act of the second defendant as its servant or agent. On this issue, I take the view that the learned sessions judge had dealt with the right cases but came to the wrong conclusion. Secondly, the learned sessions judge concludes as admitted fact that the first defendant was the employer of the second defendant who was the independent contractor, and the plaintiff could not rely on the exception to the general rule by alleging there was a breach of statutory duty by the first defendant because it was never pleaded. I think again on this issue the learned sessions judge has erred and my reasons are as follows:

(a) A claim by the plaintiff solely cannot be defeated by rules of pleading in this age and time where much literature has been advanced to condone non-compliance of rules and rules of procedure has been amended to ensure courts hear the merits of the case.

(b) In this case, the defendants were fully aware of the nature of the plaintiff's claim and the issue of liability and what they have to deal with to defend the action. They have not alleged that they have been prejudiced by the manner the plaintiff has pleaded his case. In *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10, HRH Raja Azlan Shah CJ (as HRH then was) observed:

> As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a

ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

(c) It is now trite that if the nature of the work that a man employs another to do is expected to give rise to injurious consequences to his neighbour, he must do all that is necessary to prevent the injury from materialising and he cannot pass over this burden to the independent contractor. The duty of care on his part is 'non-delegable' [see *Bower v Peate* [1876] 1 QBD 321]. Support for the proposition can be found in the cases which the plaintiffs have submitted and many more.

(d) There is a distinction between a positive claim for breach of statutory duty which is often pleaded. This is necessary for the defendant to identify the cause of action and the relevant statute which imposes the obligation. However, if in performing the statutory duty, the defendant or his employees or agent has acted in a negligent manner, then the ordinary rules as to pleading in respect of negligence will apply. Support for the proposition can be garnered from a number of cases; to name a few are as follows:

(i) In *London Passenger Transport Board v Upson and Another* [1949] AC 155, Lord Wright opined:

> … a claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty. It is an effective sanction. It is not a claim in negligence in the strict or ordinary sense; as I said in *Caswell*'s case (4): 'I do not think that an action for breach of a statutory duty such as that in question is completely or accurately described as an action in negligence. It is a common law action based on the purpose of the statute to protect the workman, and belongs to the category often described as that of cases of strict or absolute liability. At the same time it resembles actions in negligence in that the claim is based on a breach of a duty to take care for the safety of the workman. But, whatever the resemblances, it is essential to keep in mind the fundamental differences of the two classes of claim.

(ii) In *Parimala a/p Muthusamy & Ors v Projek Lebuhraya Utara-Selatan* [1997] 5 MLJ 488, the court considered the contract between the highway authority and the road user. The plaintiffs based their claim against the defendant on the following grounds: (i) breach of contract; (ii) breach of a statutory duty; (iii) common law negligence; and (iv) nuisance. On the facts, the court made the following observations:

> (a) The moment a ticket is extracted at the toll gate — as in this case — and the highway is used, a contract is thus struck between the parties, making the plaintiff a lawful user of the road. (b) Built into the contract is the implied term or warranty that the said highway will be safe for use by the deceased and his passengers. (c) As the defendant failed to use the requisite amount of care to ensure the safety of the deceased and the plaintiffs pursuant to the contract,

by virtue of the careless behaviour of the defendant, the implied warranty was breached. (d) Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. (e) In the present case, inspite of the knowledge that that area had experienced broken fences where animals had escaped and strayed on to the road and being aware of the potential dangers, the defendant had not found it fit either to take extra measures or give special attention to that spot to alleviate any disaster. (f) On the issue of foreseability, any reasonable man certainly will anticipate that cars will be driven at some speed when using the highway and if any cow (with the foreknowledge that cows do grass around that area) were to stray on the highway, not only is it foreseeable that a collision will occur, but injury or death is the near certain outcome. With the available facts, it would have been impossible to deny the defendant's negligence. (g) Further, to accede to the submission of the defendant that the plaintiffs should have instead sued the owner of the cow would tantamount to exonerating the defendant of all its liabilities and duty of care towards any road user. (h) Statutory duty involves the notion of taking care not to injure and actions for breach of statutory duty come within the category of negligence. (i) There is sufficient authority to say that if a person's right of free passage or of some rights connected therewith has been the subject of interference, he is endowed with the right to take up a nuisance action. In the present case, the plaintiffs had relied on the doctrine of *res ipsa loquitur* to highlight the interference. (j) However, the doctrine of *res ipsa loquitur* was inappropriate as there was evidence to indicate why or how the incident occurred. (k) By being able to determine how or why the incident happened, the approach of the plaintiffs to apply the doctrine of *res ipsa loquitur* was unacceptable.

[25] I have gone through the appeal record and submissions of the parties in detail. I am inclined to take the view that the appeal must be allowed for the following reasons:

(a) the defendants are liable to the plaintiff, and failure to plead on the facts of this case cannot defeat the plaintiff's claim.

(b) In this case, I find that the plaintiff has adequately pleaded the case and the defendant is not prejudiced.

(c) On the issue of quantum, I take the view that the plaintiff's claim for special damages must be strictly proved. Special damages are compensations awarded by the court for the actual pecuniary loss suffered by the plaintiff and it is trite that it must be specifically pleaded and proved. On the facts of this case, the learned sessions judge had dealt with this issue in detail and set out her reasons. I do not think I ought to disturb her finding on quantum where the law places the burden on the plaintiff to specifically plead and proof. In consequence, the award of RM4,150 as special damages is sustained.

(d) On the issue of general damages, the plaintiff's submission here and below is not sufficiently convincing enough for the court to assess general damages. There is a duty for the plaintiff to adduce sufficient material for the court to make appropriate orders as to general damages. In this case, the learned sessions judge had on the material submitted before the court, awarded a sum of RM1,000 as general damages. I do not find any reason to disturb the award.

A **[26]** For reasons stated above, I allow the plaintiff's appeal with an order that the first defendant pays the plaintiff a sum of RM4,150 as special damages and a sum of RM1,000 for general damages with interest as pleaded in the amended statement of claim.

B **[27]** On the issue of costs, I reserve the matter to another date. The court will inform the parties as to the date of decision as to costs. I Hereby Order So.

Ordered accordingly.

C Reported by Sally Kee

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